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Supreme Court, U.S.
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No. 04-489

IN THE

Supreme Court of the United States

BROWARD YACHTS, INC., a Florida Corporation,

Petitioner,

v.

SEAGROVE TRADING, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

BETH T. VOGELSANG
BARRANCO, KIRCHER & VOGELSANG, P.A.
150 W. Flagler Street
Suite 1400
Miami, Florida 33130

MARK HICKS
Counsel of Record
HICKS & KNEALE, P.A.
799 Brickell Plaza
Suite 900
Miami, Florida 33131
(305) 374-8171

Counsel for Respondent

190838

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Whether a partially completed yacht is a "vessel" for the purposes of invoking admiralty and maritime jurisdiction.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondent, Seagrove Trading, Inc., hereby certifies that it has no parent corporation and that no publicly held company owns ten percent or more of its stock.

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STATEMENT OF THE CASE

To the extent it is not argumentative, respondent agrees with the statement of the case set forth in the petition. In addition, respondent refers the Court to the findings of fact — undisputed by petitioner — in the order of the district court appended to the petition. (Pet'r's App. at A7-10.)

REASONS FOR DENYING THE PETITION

The petition seeks review of an unpublished opinion of the United States Court of Appeals for the Eleventh Circuit on the ostensible basis that it conflicts with the decisions of two other circuits. However, given that the decision below is unpublished, it plainly will have no prospective impact on future litigants. This fact in and of itself illustrates the petition's total lack of "compelling reasons" for granting certiorari. *See* Sup. Ct. R. 10. Additionally, inasmuch as the gravamen of the petition is a mere disagreement with the Eleventh Circuit's application of a longstanding rule of law established by the Court, there exists no reason, compelling or otherwise, for the Court to exercise its discretion to grant the petition. *See id.* ("A petition for writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law.")

I. There Is No Conflict Between the Decision Below and the Decisions of This Court or Other Circuit Courts of Appeals

Almost 150 years ago, in *The People's Ferry Co. of Boston v. Beers*, 61 U.S. (20 How.) 393 (1857), this Court held that contracts relating to the original construction of a ship are not maritime contracts that come within the admiralty

jurisdiction of federal courts. *Id.* at 401-02. The Court has followed this rule ever since. *E.g.*, *East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 872 n.7 (1986); *Kossick v. United Fruit Co.*, 365 U.S. 731, 735, (1961); *New Bedford Dry Dock Co. v. Purdy*, 258 U.S. 96, 99 (1922); *The Winnebago*, 205 U.S. 354, 363 (1907); *Edwards v. Elliott*, 88 U.S. (21 Wall.) 532, 553 (1874); *Roach v. Chapman*, 63 U.S. (22 How.) 129, 132 (1859).

Additionally, more than eighty years ago, in two decisions issued a year apart, this Court crafted the standard for determining when a vessel being constructed pursuant to contract comes into legal existence: "The structure does not become a ship, in the legal sense, until it is completed and launched." *North Pacific S.S. v. Hall Bros. Marine Ry. & Shipbuilding Co.*, 249 U.S. 119, 127 (1919). A year later, in *Thames Towboat Co. v. The Schooner "Francis McDonald"*, 254 U.S. 242 (1920), the Court clarified the meaning of "completed" when it held that a contract to construct a vessel "not sufficiently advanced to discharge the functions for which intended" nor in a "condition to function as intended" is not maritime in nature. *Id.* at 243, 245.

Federal courts have rigorously applied this benchmark ever since. Far from either creating a "clear split" among the circuits or misapplying the rule, as the petition suggests, the Eleventh Circuit decided the issue before it with a straightforward application of the principles set forth by this Court over eighty years ago. Further, under *Beers* and its progeny, it is abundantly clear that the lease agreement pursuant to which the petitioner supplied its facility for construction of the Destiny Hull is not a maritime contract.

A. Both Cases Cited by the Petition as Conflicting with the Instant Case Are Inapplicable Given the Facts Found Below

The petition asserts that the Eleventh Circuit's decision below conflicts with *McCarthy v. the Bark Peking*, 716 F.2d 130 (2d Cir. 1983), and *Burks v. American River Transportation Co.*, 679 F.2d 69 (5th Cir. 1982), two cases that construed the definition in 1 U.S.C. § 3 of what constitutes a "vessel." However, both of these cases not only can be readily distinguished from the case at bar, but also are in fact inapposite.

The plaintiff in *McCarthy* sought damages against a museum vessel under the Longshoreman's and Harborworker's Compensation Act ("LHCA"), 33 U.S.C. §§ 901-950, for injuries he suffered while painting the upper mainmast. Because the LHCA provided a remedy for those injured as a result of the "negligence of a vessel," 33 U.S.C. § 905(b), the Second Circuit panel sought to determine whether the museum piece fit the definition of "vessel" set forth in 1 U.S.C. § 3. *McCarthy*, 716 F.2d at 133. The vessel had been launched more than sixty years before, although it had not put out to sea under its own power in forty years. *Id.* at 135 n.6. The panel nevertheless found that "as long as [the museum vessel] rides at anchor in the harbor, ready and able to head for the open seas, even in tow, she remains a vessel" for the purposes of 1 U.S.C. § 3. *Id.* at 136.

Similarly, in *Burks*, the plaintiff longshoreman brought an action for unseaworthiness against a barge owner for injuries he had suffered on the barge while offloading cargo to a second non-propelled barge on which he principally worked. 679 F.2d at 70. The plaintiff sought to come within

an exception in the LHCA that excluded any "member of a crew of any vessel" from LHCA benefits, and thus effectively permitted an action for unseaworthiness otherwise unavailable to longshoremen. *Id.* at 75 (quoting 33 U.S.C. § 902(3)). Observing that in *Norton v. Warner Co.*, 321 U.S. 565 (1944), this Court had found that a dumb barge fell within the definition of "vessel" in 1 U.S.C. § 3, the Fifth Circuit court concluded that the two barges at issue also fell within the definition. *Burks*, 679 F.2d at 75.

There are several overarching and interrelated distinctions between the instant case and *McCarthy* and *Burks*. First, both *McCarthy* and *Burks* were LHCA-related actions that sounded in tort. The case at bar is a 46 U.S.C. § 31342 *in rem* action, in which the petitioner asserts that it has a maritime lien against the Destiny Hull pursuant to an agreement with Destiny to lease its premises for construction of the hull. Because *McCarthy* and *Burk* are tort actions and the plaintiffs therein did not, as petitioner does here, seek to invoke admiralty jurisdiction based in contract, these Second and Fifth Circuit cases are entirely inapplicable.

Second, while the Destiny Hull was found to be only partially completed, (Pet'r's App. at A7), both *McCarthy* and *Burks* involved "completed" vessels. There was no question that the *McCarthy* vessel had "become a ship, in the legal sense" because it had long since been "completed and launched." *North Pacific S.S. Co. v. Hall Bros. Marine Ry. & Shipbuilding Co.*, 249 U.S. 119, 127 (1919). So, too, had the barges in *Burks* been completed long before the question of whether they fell within the definition of "vessel" in 1 U.S.C. § 3 arose.

Third, and most important, *McCarthy* and *Burks* did not involve a contract to construct a vessel. Based upon this Court's decisions in *North Pacific Steamship* and *Thames Towboat Co. v. The Schooner "Francis McDonald"*, 254 U.S. 242 (1920), federal courts have consistently and uniformly held that a vessel under construction pursuant to contract is not a "vessel" for the purposes of invoking admiralty and maritime jurisdiction until the structure is "sufficiently advanced to discharge the functions for which she was intended" and/or in a "condition to function as intended."[1]

It is undisputed that the Destiny Hull was a vessel under construction pursuant to contract and that its structure was only two-thirds advanced to discharge her intended function as a luxury yacht. (Pet'r's App. at A9.) It has long since been settled that there is no basis for invoking admiralty and maritime jurisdiction under such circumstances. The circumstances in *McCarthy* and *Burks* were not even remotely similar to the instant case because both cases were tort actions involving completed vessels and neither involved a contract to construct a vessel. Consequently, no conflict of any sort exists between *McCarthy* and *Burks* and the case at bar.

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1. *E.g.*, *Hatteras of Lauderdale, Inc. v. Gemini Lady*, 853 F.2d 848, 851 (11th Cir. 1988); *Nilo Barge Line, Inc. v. M/V Bayou DuLarge*, 584 F.2d 841, 843 (8th Cir. 1978); *Boat La Sambra v. Lewis*, 321 F.2d 29, 30-31 (9th Cir. 1963); *Hyundai Heavy Indus. Co., Ltd. v. M/V Saibos FDS*, 163 F. Supp. 2d 1307, 1312-14 (N.D. Ala. 2001); *Stephens Boat Co., Inc. v. Barge ORR 1*, 791 F. Supp. 145, 147 (E.D. La. 1992); *MacDougall's Cape Cod Marine Serv., Inc. v. One Christina 40 Foot Vessel*, 721 F. Supp. 374, 376 (D. Mass. 1989); *Goudy & Stevens, Inc. v. Cable Marine, Inc.*, 665 F. Supp. 67, 69 (D. Me. 1987), *Bill Fowler, Inc. v. Stadler*, 558 F. Supp. 1115, 1117 (S.D. Fla. 1983); *General Engine & Mach. Works, Inc. v. Slay*, 222 F. Supp. 745, 747-48 (S.D. Ala. 1963).

B. The Eleventh Circuit Correctly Applied This Court's Longstanding Precedent That a Contract Related to the Construction of a Vessel Is Nonmaritime

The petition nonetheless asserts that in addition to an ostensible conflict with the Second and Fifth Circuits, the Eleventh Circuit actually misapplied this Court's precedent because the *Thames* doctrine has never been applied to "third parties, such as Broward Yachts, whose rights do not arise from a construction contract." (Pet. at 8.)

However, the undisputed findings of fact below show that Broward Yachts is not a mere disinterested third party. Indeed, the entire basis for Broward Yacht's assertion of a maritime lien on the Destiny Hull is the license agreement in which it agreed "to permit Destiny to continue manufacturing the Destiny Hull on Broward Yachts' premises." (Pet'r's App. at A8). If "the settled rule is that a contract for the complete construction of a ship or supplying materials therefor is nonmaritime, and not within the admiralty jurisdiction," *Thames*, 254 U.S. at 243, then certainly a contract to supply the premises for construction of a ship is nonmaritime.

This conclusion is borne out by the decisions of circuit courts applying *Thames*. In *Boat La Sambra v. Lewis*, 321 F.2d 29 (9th Cir. 1963), the plaintiffs in separate suits sought to enforce maritime liens against two boats based on agreements to furnish a ship-to-shore radio to one and an automatic pilot to the other. *Id.* at 29. The Ninth Circuit panel found that both accessories constituted original equipment, became an integral part of the boats, were purchased before the boats were ever used, and were installed when the boats

were still undelivered and at the dealer's premises. *Id.* at 31. The court held that neither case fell with the district court's admiralty jurisdiction because "the contracts for this equipment and its installation related to [the boats'] original construction," and thus fell within the rule in *Thames*. *Id.* at 29, 31.

Similarly, in *Nilo Barge Line, Inc. v. M/V Bayou DuLarge*, 584 F.2d 841 (8th Cir. 1978), the plaintiff brought an *in rem* action against a vessel pursuant to an agreement to lease electronic navigational equipment, which had been installed on the vessel during its construction. *Id.* at 842. The lease had been assigned to the plaintiff by the original lessor, and the plaintiff sought to share in the proceeds of a marshal's sale of the vessel. *Id.* Observing that the plaintiff could not participate in the distribution of proceeds from the sale unless it established that a maritime lien attached to the leased equipment, the Eighth Circuit observed that "[i]t is well settled that a contract for building or supplying materials for the original construction and outfitting of a ship is not a maritime contract." *Id.* (citing *Roach v. Chapman*, 63 U.S. (22 How.) 129 (1859)). After discussing the *Thames* doctrine, the Eighth Circuit panel held that "[t]he facts of this case fit squarely within this doctrine." *Id.* at 843.

Accordingly, this Court's precedent, stretching from *Beers* to *Thames* and beyond, and applied by the circuits, has established the bedrock proposition that any contract *relating to* the construction of a vessel — not merely a contract *for* construction of a vessel, as the petition erroneously suggests — is not a maritime contract and does not come within the admiralty jurisdiction of federal courts. *See East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 872 n.7 (1986) ("[C]ontracts *relating to* the

construction of or supply of materials to a ship are not within the admiralty jurisdiction.") (emphasis added). The licensing agreement here expressly provided that Broward Yachts was leasing its facility "to permit Destiny to *continue manufacturing* the Destiny Hull." (Pet'r's App. at A8) (emphasis added). Such an agreement is inarguably a contract relating to the construction of a vessel and is therefore not a maritime contract.

C. Even If Broward Yachts Supplied "Necessaries" to the Destiny Hull, the Eleventh Circuit Correctly Decided that a Maritime Lien Did Not Attach Because the Hull Was Not Yet a "Vessel"

The petition further contends that because 46 U.S.C. § 31342 provides that a person who supplies "necessaries to a vessel" has a maritime lien on the vessel, and because "necessaries" is defined to include "repairs, supplies, towage, and the use of a dry dock or marine railway," *id.* § 31342(4), Broward Yachts has a maritime lien because it provided "storage and wharfage" for the Destiny Hull. (Pet. at 9.) However, the petition simply assumes the major premise that the Destiny Hull is in fact a "vessel." As discussed *supra*, the Destiny Hull was not a "vessel" because a "structure does not become a ship, in the legal sense, until it is completed and launched," *North Pacific S.S. v. Hall Bros. Marine Ry.*, 249 U.S. 119, 127 (1919), and is not "completed" until it is "sufficiently advanced to discharge the functions for which intended" and in a "condition to function as intended." *Thames Towboat Co. v. The Schooner "Francis McDonald"*, 254 U.S. 242, 243, 245 (1920).

The petition then attempts to quibble with this Court's longstanding precedent by pointing out that the Destiny Hull

had been floated on navigable waters to the Broward Yachts facility, and that by "taking the Eleventh Circuit's reasoning to is logical conclusion," a ship designed to be fitted with a crane to fulfill its intended purpose that has sailed across the Atlantic to have the crane installed would not be a "vessel" for the purposes of admiralty jurisdiction. (Pet. at 9.) Whether the Eleventh Circuit or this Court would find as much upon such facts is open to debate, but it is clear that the actual facts here fit well within those in *Thames*.

In *Thames*, a shipbuilding company began construction of the subject schooner in Groton, Connecticut, and launched the hull. 252 U.S. at 243. However, the company was unable to continue with construction. *Id.* The claimant, a second shipbuilding company, agreed with the owner to complete construction at its yard in New London, Connecticut, to which the hull was towed. *Id.* Seeking to recover for the materials, labor, and work supplied, the claimant argued to this Court that because the contract was one for work and material to finish a vessel after it had been launched and was water-borne, it was within federal admiralty jurisdiction. *Id.* at 243-44. Rejecting the claimant's argument, the Court held that the same reasons which exclude contracts to construct entirely new ships "likewise apply to agreements made *after the hull is in the water*, for the work and material necessary to consummate a partial construction and bring the vessel into condition to function as intended." *Id.* at 244 (emphasis added).

Just as in *Thames*, where the fact that the hull had been towed from Groton to New London did not convert a contract to provide work and material to the hull into a maritime contract, the fact that the Destiny Hull here was floated six miles on navigable waters to the Broward Yachts facility also

does not convert the license agreement into a maritime contract. Because the license agreement was expressly made for the purpose of permitting the continued manufacture of the Destiny Hull, it is an agreement related to the construction of a vessel and, therefore, nonmaritime. Accordingly, the decision by the Eleventh Circuit below was completely consistent with *Thames* and those decisions of other circuits applying the doctrine set forth therein.

CONCLUSION

For the foregoing reasons, respondent respectfully requests that the Court deny the petition.

Respectfully submitted,

BETH T. VOGELSANG
BARRANCO, KIRCHER & VOGELSANG, P.A.
150 W. Flagler Street
Suite 1400
Miami, Florida 33130

MARK HICKS
Counsel of Record
HICKS & KNEALE, P.A.
799 Brickell Plaza
Suite 900
Miami, Florida 33131
(305) 374-8171

Counsel for Respondent